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No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

REPLY BRIEF OF APPELLANT

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I

JURISDICTION

Appellee's arguments concerning the Court's jurisdiction over Question 1, Br. of Appellee, at 20-27, revisit the same issues which were fully aired in his Motion to Dismiss, at 10-17, and presumably rejected when probable jurisdiction was noted. Appellant will respond only to the extent appellee's previous arguments have been re-packaged or where additional authorities have been presented.[1]

A. The Excessive Fines Clause Question

1. *The Presentation of the Excessive Fines Clause Question*

Appellee's arguments regarding the presentation of the Excessive Fines Clause question to the court below, Br.

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[1] Appellant will not respond to appellee's attempt to re-characterize the record below. Br. of Appellee, at 1-6. The relevant core of the proceedings below is that a Mississippi jury determined that appellant's handling of appellee's insurance claim was unfair or improper and merited a $1,600,000 penalty. Although the amount of the fine did not "shock . . . the judicial conscience" of five justices of the Supreme Court of Mississippi, four justices of that court found the magnitude of the fine either "grossly excessive" or completely unwarranted because of appellee's reliance on its highly qualified Medical Director. The simple fact that punishment of this magnitude may be exacted for conduct which so divides medical experts and the highest court of a state conveys telling messages concerning punitive damages.

Appellee's discussion of the trial court's instructions to the jury, Br. of Appellee, at 2 n.2 and 46 n.69, regarding punitive damages is incomplete and misleading. Appellee makes reference to only three of the instructions given to the jury regarding the standards pursuant to which punitive damages could be awarded and the amount of any punitive award. In the interest of completeness, all six of the pertinent instructions have been reproduced in the appendix to this brief. The confused, unintelligible standards pursuant to which the jury returned its verdict for punitive damages are relevant to, and mirrored by, the vague, shifting standards pursuant to which this verdict was affirmed by a narrow majority of the court below as discused in part III, *infra*.

of Appellee, at 22-26,[2] are primarily directed to the inartful manner in which this federal question was raised. Such lack of sophistication, however, has been held by the Court not to deprive it of the power to decide important constitutional questions, *Eddings* v. *Oklahoma*, 455 U.S. 104, 114 n.9 (1982). A unanimous Court applied this principle in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980), on which appellant relied at the jurisdictional stage, *see* Reply Mem., at 7-8 & nn.5 & 6.[3]

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[2] Appellee reiterates arguments made in his Motion to Dismiss, at 13-17, that appellant was required to present its federal challenge to the magnitude of the punitive fine in the trial court both pre- and post-trial. Br. of Appellee, at 25. In renewing these arguments, appellee does not address the holding of the trial court that it had no power to consider appellant's challenge to the size of the punitive award, *see* J. S., at 10-12, a holding which deprived appellant of any "reasonable opportunity" to have its federal and state law challenges to the punitive damage award determined by that court. *Central Union Telephone Co.* v. *City of Edwardsville*, 269 U.S. 190, 194-95 (1925). Although *Central Union* was relied upon by appellant, Reply Mem., at 9, and is controlling, appellee does not even cite that case.

Appellee's argument is deficient in other crucial respects. Appellee cites *Educational Placement Services* v. *Wilson*, 487 So.2d 1316 (Miss. 1986), as establishing what he characterizes as a "consistently-applied" practice of the court below in refusing to consider questions not presented to the trial court, but neglects to bring to the Court's attention subsequently decided cases in which the court below decided issues raised for the first time on direct appeal. *See Town of Madison* v. *Bear Creek Water Ass'n, Inc.*, 510 So.2d 800 (Miss. 1987); *Griffin* v. *Mississippi*, 504 So.2d 186 (Miss. 1987). More importantly, neither appellee nor the cases he cites address the practice of the court below as regards the presentation of issues on rehearing. This Court recognized in *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), that the court below regularly entertains questions raised for the first time on rehearing. *Pitts* v. *Mississippi State Bar Association*, 462 So.2d 340, 342 (Miss. 1985) (en banc), cited in appellant's Reply Mem., at 1, but not mentioned by appellee, confirms that practice.

[3] Appellee's failure to respond to *Beckwith* in his merits brief is understandable, because *Beckwith* is dispositive on this point. In that case, the appellant's memorandum of law filed in the state trial court—

Moreover, and contrary to appellee's assertion, appellant expressly challenged on federal grounds in the court below the excessiveness of the $1,600,000 award, asserting that the award "is excessive, constitutes an *excessive fine*, and violates due process, equal protection and other constitutional standards." J. S. App., 151a (emphasis added).[4] Appellant twice challenged the size of the award as "constitut[ing] [an] excessive fine." J. S. App., 139a, 151a.

Appellee, Br. of Appellee, at 22, objects that appellant did not cite expressly to the Excessive Fines Clause of the Eighth Amendment in its briefs in the court below But appellant's challenge to the punitive damage award as being an "excessive fine" is surely sufficient. In any event, the Court has made clear that a state court liti-

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apparently the only document in the record relied upon by this Court to sustain its jurisdiction—contained a series of state law challenges to the Florida statute at issue and apparently a single reference to the "pertinent provisions of the *Florida Constitution* and its Federal counterpart." 449 U.S., at 159 n.5 (emphasis in original). In the instant case, appellant's briefs in the court below, J. S. App., 124a-152a, much more clearly relied on the *Federal Constitution*.

In *Beckwith*, the Court observed that the federal question "appears to have been raised in the Supreme Court of Florida." 449 U.S., at 159 n.5. This observation of the Court was apparently based on an assertion to that effect by the appellant's counsel at oral argument in an exchange with Justice Blackmun. Although the Court did not appear to rely on that exchange in taking jurisdiction over that case, that exchange is in any event less substantial than the briefs of appellant filed in the court below in this case.

[4] Appellee's suggestion, Br. of Appellee, at 25 n.36, that appellant's reference to "due process, equal protection" in the court below may have constituted a reference to the guarantee of due process in Art. 3, § 14 of the Mississippi Constitution overlooks the fact that Mississippi's constitution contains no equivalent of the Equal Protection Clause of the Fourteenth Amendment. Thus, appellee's speculation requires concluding that appellant shifted from state to federal grounds within a single phrase of a sentence. Furthermore, when appellant relied on provisions of the Mississippi Constitution, it expressly cited those provisions by article and section. *See* J. S. App., 135a.

gant's failure to rely on the "correct" provision of the Federal Constitution is irrelevant to this Court's power to decide a federal question so long as the question brought here is "within the clear intendment" of the contention made below. *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 599 (1954). Appellant relied on *Braniff* at the jurisdictional stage after appellee first raised this objection, Reply Mem., at 7-8 n.5. As with *Beckwith, supra*, appellee inexplicably does not even cite *Braniff*, which is indistinguishable and controlling. *See Webb* v. *Webb*, 451 U.S. 493, 501 (1981) ("we have not insisted" that "litigants identif[y] in the state courts precisely the provisions of the Federal Constitution . . . on which they rely . . . .").

Thus, the rule announced by this Court in *Webb* v. *Webb*, 451 U.S., at 501, requiring "that a claim under . . . the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature and substance of the federal claim at the time and in the manner required by state law," is fully satisfied in this case.

2. *The Excessive Fines Clause Question Is Worthy Of Plenary Consideration*

Appellee's contention that the Excessive Fines Clause question does not meet this Court's standards for the exercise of its certiorari jurisdiction is authoritatively refuted by the Court's direct statement just eighteen months ago in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (Apr. 22, 1986) slip op., at 13, 106 S. Ct. 1580, 1589 (1986) (emphasis added), characterizing the Excessive Fines Clause question as raising an "important" issue "which . . . *must* be resolved," and the Court's unrestricted notation of probable jurisdiction in this case.[5]

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[5] Appellee's argument, Br. of Appellee, at 26-27, that the Excessive Fines Clause question need not be reached because Congress and some state legislatures may be "actively considering a broad range of re-

B. The Due Process Clause and Contract Clause Question

Appellant expressly asserted below that the court had, in affirming the punitive damage award, "change[d] the law" regarding punitive damages in violation of "constitutional requirements of equal protection." J. S. App., 138a. Appellee contends, Br. of Appellee, at 44-45, that appellant cannot rely on the Contract Clause or the Due Process Clause in support of this federal challenge in this Court because those clauses were not cited to the court below and because this challenge was not raised until the rehearing stage.

Appellee's initial contention is overcome by the same authorities discussed above regarding appellant's entitlement to invoke the Excessive Fines Clause in this Court. Appellee's contention regarding the timeliness of this challenge ignores the fact that this federal question did not arise until the court below had formulated new substantive standards of conduct in 1985 and had imposed on appellant a $1,600,000 penalty for not having complied with those standards in 1979 and 1980. Thus, cases such as *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85-87 n.9 (1980) *and cases cited* (litigants entitled to raise in this

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strictions on punitive damage awards" is singularly devoid of any specifics as to the nature of the legislation pending or the likelihood of its enactment. S. 544, cited by appellee in his brief at 26 n.39, would place no limit on the size of punitive damage awards.

Appellee's reliance, Br. of Appellee, at 27, on *Mishkin* v. *New York*, 383 U.S. 502, 512-13 (1966), to suggest that the record in this case does not present the Excessive Fines Clause question with "sufficient clarity," is misplaced. The Court's concern in *Mishkin* centered *exclusively* on the absence in the record of an evidentiary basis for deciding the fact-bound Fourth Amendment question presented. Whether the Excessive Fines Clause applies to punitive damages, in sharp contrast, is not dependent for its resolution on any facts; it is a pure question of federal constitutional law which can only be resolved definitively by this Court.

Court a federal question raised at first opportunity to do so in the state court system), require rejection of appellee's contention.

II

THE $1,600,000 PUNITIVE AWARD IMPOSED BY THE MISSISSIPPI COURTS VIOLATES THE EXCESSIVE FINES CLAUSE

A. Appellee's Arguments Against the Applicability of the Excessive Fines Clause Are Specious

The origin and development of the Eighth Amendment's antecedents must be examined and applied in this case in the context of a governmentally imposed, court approved, $1,600,000 fine levied in order to punish and deter perceived antisocial conduct—precisely the purposes served by the criminal law. The incontrovertible history of the English antecedents of the Excessive Fines Clause, *viewed in light of this purpose*, requires the result urged by appellant. Appellee avoids any discussion of the *purpose* of the punitive fine in this case and the *purpose* of English and American constitutional restrictions on excessive, governmentally imposed punitive fines. Instead, appellee advances two simple and closely related propositions which are critical to his position but which fall of their own weight when scrutinized.

The first proposition, Br. of Appellee, at 28, is that punitive damages must be distinguished from other governmentally imposed financial penalties because they are not extracted by the government "to fine or punish for *its own benefit*," *id.* (emphasis added), but rather are merely made available by the government "but 'designed *for the benefit of other parties.*' " *Id.*, *quoting Ingraham* v. *Wright*, 430 U.S. 651, 668 (1977) (emphasis added). Appellee's unstated premise is that punitive fines in civil cases are not intended primarily to serve the government's objectives. But that premise is plainly false, and the history

of punitive damages is to the contrary. Punitive damages are invariably justified as serving society's goals.[6]

Even assuming the validity of appellee's major premise, the logical fallacy in appellee's reasoning is his assumption that the government's involvement becomes immaterial merely because there may be some ancillary benefit to a private litigant. Such logic would, for example, authorize privately obtained injunctions against the printing of newspapers despite the First Amendment's prohibition against the government's obtaining such an order for its own "benefit." That is not the law.

Appellee's second, closely related proposition, Br. of Appellee, at 30-35, is that these punitive fines are "different" for constitutional purposes because they are "awarded to private plaintiffs" rather than paid to the government. *Id.*, at 30. Appellee seems to argue, Br., at 30-33, that the principal concern over amercements and fines reflected in Magna Carta and the English Bill of Rights is that they were set by and payable to the King and therefore subject to abuse whenever the Crown needed to generate additional revenue. This premise is, however, grounded in a myopic view of history.

Concern over excessive and disproportionate punishment has ancient roots that go far beyond the potential "conflict of interest" identified by appellee. From Genesis, Leviticus and the *lex talionis*, the concept of proportionality—equality between the crime and the punishment—has been abid-

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[6] Appellee's counsel advised the jury during his opening statement: "we are asking you to return to us a sizable verdict . . . not to compensate Lloyd Crenshaw, but to penalize this company and let them know that the people of Jackson County don't like their insurance claims handled in that manner." R. 174. The jury was subsequently instructed that punitive damages "are never awarded to benefit the injured party, but rather to punish and compel the wrongdoer to have due and proper regard for the rights of the public." R. 1130, App. 5a, *infra*.

ing and fundamental. *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 Calif. L. Rev. 839, 844 (1969); Montesquieu, *The Spirit of Laws* *111 (bk. VI, ch. XVI) ("It is an essential point that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a lesser . . . ."). And even if history were to the contrary—which it is not—"neither the antiquity of a practice nor the fact of steadfast . . . judicial adherence to it through the centuries insulates it from constitutional attack . . . ." *Williams* v. *Illinois*, 399 U.S. 235, 239 (1970).

Underlying appellee's argument is the proposition that American governments may achieve the retributive and deterrent purposes of punitive fines without regard to centuries-old restrictions on excessive monetary punishments by the simple expedient of turning those fines over to private persons. Appellee has, however, advanced no support in law, logic or history for his gossamer theory.[7]

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[7] Appellee also argues, Br. of Appellee, at 31, that amercements are "different" from punitive damages because the former were imposed not only upon "great or serious" offenses, but also for "minor and trivial" offenses, whereas punitive damages are awarded "only" where "particularly culpable and reprehensible behavior" is involved. Like appellee's other arguments, this one starts with a false premise and then stretches to reach conclusions which are untenable even if the premise were valid. The suggestion that punitive damages are available only for egregious, highly culpable conduct is simply wrong. They may be awarded for conduct which a jury finds to be "wanton" or in "reckless disregard for the rights of others" (Iowa), for "gross negligence" (Arizona) or even "rudeness" or "mere caprice" (North Carolina). *See* Long, *Punitive Damages: An Unsettled Doctrine*, 25 Drake L. Rev. 870, 880-81 (1976). *See, e.g., Bonsignore* v. *City of New York*, 521 F. Supp. 394 (S.D.N.Y. 1981) (New York City held liable for $125,000 punitive damage award to wife of police officer shot by her husband on basis of city's policy of requiring police officials to carry firearms while off duty). Even if this dichotomy actually existed, appellee does not suggest how this asserted "difference" would give rise to a distinction of constitutional dimension.

B. The Historical Relevance of the Amercements Clauses

Appellee acknowledges that a substantial consideration in determining whether the Excessive Fines Clause limits the magnitude of punitive damage awards is the historical derivation of that Clause. Br. of Appellee, at 27-28 n.40. Moreover, appellee does not dispute that the principal purpose served by amercements, fines, and punitive damages is to inflict punishment on the perpetrator of antisocial conduct in order to deter the wrongdoer and others from engaging in similar conduct. Br. of Appellant, at 25-26; Br. of Aetna Life Insurance Co., *et al.*, as *Amici Curiae*, at 10-11 ("Br. of Aetna"). However, appellee asserts that Chapter 20 of Magna Carta was concerned only with limiting the ability of the Crown to determine the size of potential amercements which would be paid into its coffers. But neither the text nor historical application of Chapter 20 provides any support whatsoever for that argument.

On its face, *see* Br. of Appellant, at 23, Chapter 20 adopts substantive limitations on the size of amercements without regard to the identity of the beneficiary of the extraction. In addition, amercements were, as an historical fact, paid to officials other than the Crown. *See* Br. of Aetna, at 16 n.26 & 17 n.27. Furthermore, the central point of Chapter 20 was to remove the *arbitrary* element in the exaction of amercements by requiring the Crown to "conform to its own customary rules." W. McKechnie, *Magna Carta* 287 (2d ed. 1958). *See generally* Br. of Aetna, at 15. This objective was, in practice, achieved through the articulation of substantive standards and the imposition of procedural regularity on the amercements system. This objective was also pursued by those who drafted the prohibition on excessive fines as it appeared in the Declaration of Rights of 1689, subsequently enacted later that year by Parliament as the English Bill of Rights. Those drafters "wanted to prohibit punishments that were unauthorized by statute . . . ." L. Schwoerer, *The Declaration of Rights,*

1689, 93-94 (1981). Appellee cites *no* evidence to the contrary.

Appellee also argues that English constitutional limits on excessive penalties would have been regarded as inapplicable to 20th-Century punitive damage awards because in some cases English courts in the 18th Century perceived themselves to be without authority to set aside disproportionate "exemplary damage" awards. Br. of Appellee, at 33-35. Appellee's argument, however, totally fails to address the fact that the three cases upon which he relies[8] either involved misconduct by government officials, who did not enjoy the protection of the Amercements Clauses, *see* E. Coke, *The Second Part of the Institutes of the Laws of England* 27 (6th ed. 1681); Br. of Appellant, at 29, or involved "exemplary damage" awards which were perceived to be compensatory as well as punitive. *Id.*, at 28-30.

As appellant has demonstrated, *id.*, the blending of the reparative and retributive rationales by English courts in the 18th Century to justify the affirmance of the earliest "exemplary damage" awards explains in part why the defendants in those cases may not have invoked the principle of proportionality in Magna Carta and the Excessive Fines Clause of the English Bill of Rights. It was not until the middle of the 19th Century that punitive damages in their more purely punitive form—imposed, like amercements and fines, for the purposes of punishment and deterrence—began to emerge "as 'a sort of hybrid between a display of ethical indignation, and the imposition of a criminal fine.' " W. Hale, *Handbook on the Law of Damages* 303 (2d ed. 1912). At that point, the reparative and retributive purposes of the law continued to be joined in

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[8] *Huckle* v. *Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763); *Grey* v. *Grant*, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (C.P. 1764); *Benson* v. *Bart*, 3 Burr. 1846, 97 Eng. Rep. 1130 (1766).

civil actions, but the function of punitive or exemplary damages was finally recognized as purely punitive.

The best indication of the meaning and intended reach of the Excessive Fines Clause is not, as appellee would have it, a few English cases from the mid-18th Century before "exemplary damages" had taken on the exclusively punitive and deterrent role they now perform. Rather, the understanding of the Colonists and Framers of the Eighth Amendment who, as history shows, fully intended to protect themselves from disproportionate, excessive punishment, is the better source from which to derive the meaning of the Excessive Fines Clause.

The distinctions between "amercement" and "fine" had become blurred as early as the 15th Century. Br. of Aetna, at 18 n.29. As documented by *amici curiae*, the Colonists also used the terms amercement and fine interchangeably in the fundamental Colonial documents, some of which expressly incorporated Chapter 20 of Magna Carta. Br. of Aetna, at 20-25. Those materials demonstrate the understanding of the Colonists that Chapter 20 was applicable to fines imposed in civil as well as criminal cases, *id.*, at 23,[9] and was applicable to fines payable directly to a pri-

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[9] The understanding of the Colonists regarding the applicability of Chapter 20 and the prohibition on excessive fines in the English Bill of Rights of 1689 to civil cases mirrors the understanding of the committees of the Convention which drafted Article 10 of the Declaration of Rights in early 1689 and the Members of Parliament who enacted the Declaration as the Bill of Rights later that year. Professor Massey, after a thorough exposition of the relevant historical materials, concludes that the prohibition on excessive fines in Article 10 of the Declaration "should be read as prohibiting excessive fines and amercements, whether imposed by judge or jury, in both civil and criminal proceedings." Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1256 (Nov. 1987) (to be published).

An examination of the briefs before the Court in *Ingraham* v. *Wright*, 430 U.S. 651 (1977), demonstrates that the primary historical materials

vate litigant, *id.*, at 21. Like the drafters of the English Bill of Rights, the Colonists, including the Framers of the Eighth Amendment, were concerned about excessive governmentally imposed punishments, not the particular form in which such punishments were administered. The suggestion that the Colonists would have been indifferent to excessive governmentally imposed financial sanctions merely because they were paid to randomly selected citizens rather than to the government's treasury defies common sense and is not supported by any historical evidence.[10]

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relied on by appellant, *amici curiae* Aetna, *et al.*, and Professor Massey were not placed before this Court by the litigants in *Ingraham*. This lack of full development of the historical background of the framing of the English Bill of Rights may well have been responsible for the Court's suggestion in *Ingraham* that the Eighth Amendment applies only to punishment imposed after a criminal trial. As noted at the time, the *Ingraham* Court proffered this suggestion based upon a "vague and inconclusive recitation of the history of the [Eighth] Amendment." 430 U.S., at 685 (White, J., dissenting).

Moreover, in *Ingraham* the Court's opinion observed that, as an historical fact, the use of moderate corporal punishment by a teacher to correct a student in his care was viewed as "lawful," 430 U.S., at 661, by Blackstone. In sharp contrast, the exaction of excessive amercements (and, later, fines) has been violative of English law since at least 1215. Thus, while English history arguably supported the result reached in *Ingraham*, it did not support the breadth of some of the Court's language. As Professor Massey's research establishes, the elimination of the reference to "criminal cases" from an early draft of Article 10 of the Declaration should, in light of the contemporary events, be regarded as reflecting the understanding of the drafters that the prohibitions on excessive fines, bail and punishments were not limited to criminal cases. 40 Vand. L. Rev., at 1254-56.

[10] Appellee suggests, without elaboration, that the Court should hold the Excessive Fines Clause inapplicable to the States, Br. of Appellee, at 29 & n.43, and that corporations are not entitled to its protection, *id.* & n.44. Neither suggestion has merit. In *Robinson* v. *California*, 370 U.S. 660 (1962), the Court first held the Cruel and Unusual Punishments Clause applicable to the States through the Due Process Clause of the Fourteenth Amendment. The Excessive Bail Clause has also been held applicable to the States through the Due Process Clause. *See, e.g.*,

C. The Appropriate Measure of Constitutional Excessiveness

Appellee appears to agree that Chapter 20 of Magna Carta required amercements to be proportional to the seriousness of the conduct for which the amercement was imposed. Br. of Appellee, at 32. Appellee nevertheless argues that there is no historical support for appellant's position that the constitutional excessiveness of punitive damage awards should be measured, *at least in part*, by comparing the magnitude of such awards to civil and criminal penalties established prospectively by legislatures and made generally applicable to all citizens as the appropriate financial sanctions for comparable conduct. Br. of Appellee, at 37-41.

Appellee's explanation of his position confuses, perhaps unintentionally, two separate questions. As noted in the foregoing paragraph, the initial question regards the substantive standards imposed on the excessiveness of punitive awards by Chapter 20; on this question the parties generally agree. The second, and more important, question revolves around how English courts avoided the imposition of amercements which were disproportionate to the offense

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United States ex rel. Siegal v. *Follette*, 290 F. Supp. 632, 634-35 & nn.11-13 (S.D.N.Y. 1968).

The applicability of the Excessive Fines Clause to corporate entities is controlled by the opinion of Justice Field, writing for a unanimous Court in *Minneapolis and St. Louis Ry. Co.* v. *Beckwith*, 129 U.S. 26, 28 (1889), in which the Court reasoned "that corporations can invoke the benefits of provisions of the Constitution . . . which guarantee to persons the enjoyment of property . . . ." Moreover, at least since the enactment of the Statute of Westminster, 3 Edw.I, Ch. 6, in 1275, the protections of Magna Carta were extended to corporate and political entities. E. Coke, *The Second Part of the Institutes of the Laws of England* 27, 169-70 (6th ed. 1681). Thus, the Framers of the Eighth Amendment would have understood the Excessive Fines Clause to be applicable to corporate entities.

involved in a particular case. That latter question involves an inquiry into both substance and process.

1. *The Substantive Inquiry Into Excessiveness*

Contrary to appellee's submission, there is no doubt that limits on amercements and fines, both before and after Magna Carta, were frequently established by local customs, rules and the equivalent of statues.[11] *See* J. Holt, *Magna Carta* 50, 230-32 (1965) (cited for this specific point in Br. of Appellant, at 37). There was in fact a recognized scale of maximum amercements established in the first year of Henry VI, W. McKechnie, *supra*, at 298, and statutes also established specific limits. F. Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300-1629*, 361 (1948). This history demonstrates that in implementing Chapter 20, the English rejected the proposition that juries were competent to make the threshold determination regarding the maximum punishment which was "proportional" to the particular offense involved. In fact, the English settled on a degree of certainty that parallels the process suggested by appellant's submission to this Court on this point.[12]

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[11] Appellee asserts, Br. of Appellee, at 37-38, that amercements were not required to be proportional to punishments imposed by "Parliament." That assertion is contrary to *Earl of Devon's Case*, 11 State Tr. 1354 (1689), as discussed in appellant's opening brief, at 38-39.

[12] Appellant's proposed test of constitutional excessiveness implies none of the inflexibility that appellee suggests. *See* Br. of Appellee, at 28-29 (treble damages would *per se* violate Excessive Fines Clause). Appellant has not argued that a punitive award is invariably excessive in the constitutional sense merely because it may be greater than any particular legislatively imposed analog. Such enactments are, however, valuable benchmarks which permit an objective inquiry into excessiveness and which will produce consistent, easily administered application of the Excessive Fines Clause. Furthermore, if Mississippi had legislated a treble damage standard for insurance bad faith cases, that standard would, standing alone, reduce the punitive award in this case by $1,560,000.

2. *The Procedure Utilized to Inquire Into Excessiveness and the "Workability" of Appellant's Test for Excessiveness*

Appellee attempts to convince the Court that English juries "had unlimited discretion to determine the appropriate amount" a person should be amerced, Br. of Appellee, at 38, while simultaneously arguing that appellant's submission would require judges "to make substantive and policy judgments they are ill-equipped to make." *Id.*, at 41. The extreme tension between these two positions is self-evident. Appellee would leave within the unfettered discretion of juries the administration of an *ad hoc* system of punishment which cannot, for reasons appellee fails to articulate, be entrusted to judges guided by legislative enactments which presumptively reflect the values of society as a whole, expressed prospectively, regarding standards of conduct and penalties for deviation therefrom. Appellee's system, however, is not the system developed in England and transplanted here.

The function of English juries within the amercements system was to *reduce* an amercement which a court, often guided by rule, custom or statute, had already determined to be proportional to the particular offense involved. Br. of Aetna, at 11-14 *and authorities cited*; Br. of Appellant, 36-39. Appellee eschews responding to this well-documented argument, apparently content to stand on the proposition that reliance on judges and legislative standards in determining the maximum punitive damage award permissible in a particular case is "doomed to failure." Br. of Appellee, at 43.

The First Circuit, however, has recently recognized the arbitrariness of committing to juries the power to award unlimited punitive damages. *Rowlett* v. *Anheuser-Busch, Inc.* No. 87-1021 (1st Cir. Sept. 30, 1987). In the course of reducing a $3,000,000 punitive damage award to $300,000, that court imposed a prophylactic rule under

which trial courts were directed henceforth to establish a limit on the amount of punitive damages which could be awarded and so to instruct the jury, which would be permitted to award less, but not more, than that judicially ascertained limit. Slip op., at 33. Fashioned as a matter of statutory interpretation rather than constitutional imperative, the First Circuit's approach is both "workable" and implicitly adopts one of the key principles recognized and implemented in the antecedents of the Excessive Fines Clause: punishment administered in arbitrary, purely visceral amounts by juries is fundamentally inconsistent with our constitutional system.

III

THE COURT BELOW CHANGED THE RULES IN VIOLATION OF THE CONTRACT AND DUE PROCESS CLAUSES

Appellee argues that the Court below did not "change [the] law in any respect." Br. of Appellee, at 47. However, prior to the decision in this case the court below had never, in a bad faith case, determined that insurers would be liable for punitive damages when they had an arguable basis for denying a claim but communicated an improper basis to their insureds. As stated unequivocally by the court below:

> The issue is not the defense which Bankers Life at trial finally settled upon to defend the suit, but the reason it gave Crenshaw for denying the claim.

J. S. App., 40a, 483 So.2d, at 283. To support this proposition, the court below relied not on its prior cases but, rather, the then-recent decision of the Supreme Court of Alabama in *Aetna Life Insurance Co.* v. *Lavoie*, 470 So.2d 1060 (Ala. 1984), *vacated*, No. 84-1601 (Apr. 22, 1986), 106 S. Ct. 1580 (1986).

Having framed the "issue" in this manner, the majority of the court below affirmed a punitive damage award for

conduct held to be inconsistent with vague and uncertain standards which have not even been susceptible to clear articulation in general terms by the court below. *Compare* the majority opinion below, J. S. App., 40a-47a, 483 So.2d, at 173-76 (appellant not entitled to rely on expert opinion of Medical Director), *with* dissenting opinion, J. S. App. 64a-68a, 78a-80a, 483 So.2d, at 284-85, 290-91 (appellant justified in relying on expert opinion of Medical Director) *and Blue Cross and Blue Shield of Mississippi, Inc.* v. *Campbell*, 466 So.2d 833 (Miss. 1984) (insurer entitled to rely on expert opinion of registered nurse).

Furthermore, if the imposition of a $230.95 fine for conduct found to be "reprehensible in some respect" is violative of the Due Process Clause, *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403-04 (1966), then due process must surely be violated by the imposition of a $1,600,000 fine based on the elusive definitions of misconduct in this case presented to the jury[13] and articulated by the court below.

IV

MISSISSIPPI'S APPEAL PENALTY STATUTE ARBITRARILY BURDENS THE RIGHT TO APPEAL

A. Standard of Review

Relying on a passage from this Court's opinion in *Lindsey* v. *Normet*, 405 U.S. 56, 73 (1972), which is irrelevant to the showing which must be made to justify a State's burdening of the right to appeal, appellee defends § 11-3-23 without acknowledging the burden he carries under *Lindsey*. Br. of Appellee, at 12. As *Lindsey* held, the exercise of the statutory right to appeal "cannot be granted

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[13] As noted above, note 1, *supra*, the six jury instructions on punitive damages, reprinted in the Appendix, *infra*, 1a-7a, taken collectively, provided the jury the opportunity to impose punitive damages on the basis of virtually meaningless standards and in a virtually unlimited sum.

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to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." 405 U.S., at 77.

B. The Arbitrary Classifications Drawn by § 11-3-23

Based on his mischaracterization of the applicable standard of review dictated by *Lindsey*, appellee argues that the arbitrary overinclusiveness and underinclusiveness of § 11-3-23 are essentially irrelevant to a determination of the constitutional issue. Br. of Appellee, at 16-17. This assertion is flatly inconsistent with *Lindsey*, in which the Court held that the statute at issue was unconstitutional because it at once barred nonfrivolous appeals and allowed "meritless appeals" to go unpunished. 405 U.S., at 78. Section 11-3-23 also fails to punish certain frivolous appeals and cross-appeals, yet imposes a substantial penalty (here, $240,000) on an appellant, as here, who brings an appeal which fails by a single vote in the highest court of a state after three years of deliberation.

Appellee also theorizes that the windfall received by successful appellees may bear some relationship to "intangible costs that cannot be precisely measured, such as the emotional toll of participating in litigation . . . ." Br. of Appellee, at 15. But this suggestion merely obscures the fundamental defect in § 11-3-23. If Mississippi desires to reimburse litigants for such "intangible costs" in connection with appeals pursued within its appellate system, Mississippi is required to place all litigants who experience such "intangible costs" on an equal footing. Section 11-3-23 makes no pretense of doing so.

C. *Lindsey* v. *Normet* Is Indistinguishable

Although appellee generally ignores the pertinent aspects of *Lindsey*, his muted attempt, Br. of Appellee, at 19-20 n.26, to distinguish *Lindsey* is without merit. He argues that *Lindsey* involved "poor tenants." Yet, as the *Lindsey* Court expressly held, the statute imposed on a "nonindigent . . . appellant . . . a substantial barrier to

appeal faced by no other civil litigant . . . ." 405 U.S., at 79.[14]

Appellee also argues that the burden on appellants under that statute "doubled the stakes," while § 11-3-23 only raises the stakes by fifteen percent. The Court's concern in *Lindsey*, however, was not with the fact that the stakes were doubled but, rather, was with the fact that the windfall recovery by the landlord was "unrelated to actual rent accrued or to specific damage sustained by the landlord." *Id.*, at 77. Section 11-3-23 results in an indistinguishable "windfall" to successful appellees.

Finally, appellee contends that the double-bond requirement struck down in *Lindsey* "applied only to a very small class of litigants." But nothing in the Court's opinion in *Lindsey* suggests that the Court would have sustained the statute if its arbitrary exactions had been extended to other classes of litigants on the same unequal basis. Contrary to appellee's suggestion, Mississippi now stands virtually alone among the States in imposing arbitrary penalties on unsuccessful appellants.[15] Even Mississippi has now adopted a rational substitute for § 11-3-23.[16]

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[14] This observation by the Court disposes of appellee's argument, Br. of Appellee, at 11 n.9, that appellant has no "standing" to challenge § 11-3-23 by laying before the Court all of the arbitrary classifications drawn by § 11-3-23.

[15] Appellee acknowledges that only the States of Alabama, Kentucky and Virginia have enacted statutes under which mandatory penalties are imposed on unsuccessful money-judgment appellants. Br. of Appellee, at 19 & n.24. Alabama repealed its statute on a prospective basis effective June 11, 1987. 1987 Ala. Acts 188. The Kentucky statute imposes a penalty only on the second appeal of a case, *Ash* v. *Security National Insurance Co.*, 574 S.W.2d 346, 350-51 (Ky. 1978), while Virginia's statute is applied in very narrow circumstances. *Nationwide Mutual Ins. Co.* v. *Tuttle*, 155 S.E.2d 358, 362 (Va. 1967).

[16] On June 15, 1987, the court below promulgated new Rule 38 under which, "if this Court shall determine that an appeal is frivolous, it shall award just damages and single or double costs to the appellee."

V

CONCLUSION

This case concerns the question whether excessive, disproportionate punishment may be inflicted by the government notwithstanding an ancient and clear constitutional prohibition. Today's punitive damage system is, if anything, worse than the arbitrary fines which Magna Carta and the English Bill of Rights were adopted to control, because the present system is even more arbitrary, standardless, capricious and destructive. The $1,600,000 punitive fine at issue must be vacated and the Mississippi courts directed to reduce it according to the principles of Magna Carta and the English Bill of Rights as carried over in the Eighth Amendment.

November 20, 1987

Respectfully submitted,

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This rule was made applicable, as of January 1, 1988, only to civil cases in which § 11-3-23 "does not apply."

APPENDIX

INSTRUCTION NO. P-6—GIVEN—Filed November 30, 1981

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

LLOYD M. CRENSHAW	PLAINTIFF
VERSUS	NO. 11,292
BANKERS LIFE AND CASUALTY COMPANY	DEFENDANT

INSTRUCTION NO. P-6

The Court instructs the Jury that an insurance is obligated to deal fairly and in good faith with its insured in handling and processing an insured's claim and to refrain from abuse, gross negligence, malice, fraudulent or outrageous conduct in the handling of its insured's claim.

If you find from a preponderance of the evidence in this case that the Plaintiff filed a legitimate claim with the Defendant for the loss of his foot and that the Defendant subsequently denied and refused to pay said claim, and if you further find that such refusal was attended by abuse, gross negligence, malice, fraudulent, or outrageous conduct, then it is your sworn duty to return a verdict for the Plaintiff and in doing so, you may award both compensatory and punitive damages.

INSTRUCTION NO. P-9A—GIVEN—Filed December 3, 1981

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

LLOYD M. CRENSHAW — PLAINTIFF
VERSUS — NO. 11,292
BANKERS LIFE AND CASUALTY COMPANY — DEFENDANT

INSTRUCTION NO. P-9A

The Court instructs the jury that an insurance company and its employees, in doing the various acts required to make effective an insurance policy, owes a duty to its insureds to act in good faith in handling claims presented by its insureds. Such a relationship is a position of trust and confidence and it demands that the insurance company through its employees deal fairly and exercise good faith in administering the insurance coverage.

If you find from a preponderance of the evidence in this case that the Defendant, Bankers Life and Casualty Company, through its employees delayed or denied the payment of policy benefits, improperly handled the claim, and that such conduct amounted to a breach of the duty to deal fairly and in good faith with its insured, Lloyd M. Crenshaw, under the contract of insurance amounting to an independent tort as more fully set out in Instruction P-19A, then you may award punitive damages against the Defendant, Bankers Life and Casualty Company.

INSTRUCTION NO. P-12—GIVEN—Filed November 30, 1981

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

LLOYD M. CRENSHAW	PLAINTIFF
VERSUS	NO. 11,292
BANKERS LIFE AND CASUALTY COMPANY	DEFENDANT

INSTRUCTION NO. P-12

The Court instructs the Jury that punitive damages may also be awarded against an insurance company when an insurance company refuses to pay a ligitimate claim, and bases its refusal to honor the claim on a reason clearly contrary to the espressed [sic] provisions of its own policy as defined by law. Further, punitive damages may be awarded against an insurance company when an insurance company refuses to pay a legitimate claim and has no legitimate reason or arguable reason for failing to pay such a claim.

The purpose of punitive damages against an insurance company where an insurance company refuses to pay a legitimate claim, for the reasons stated above, is as follows: If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the amount of the claim plus interest, would enable the insurer to pressure an insured to a point of desperation, enabling the insurer to force an inadequate or avoid payment entirely.

If you believe from a preponderance of the evidence, if any, that the insured, Lloyd M. Crenshaw, filed a legitimate claim and that said legitimate claim was refused by the Defendant and that the basis for the refusal to honor the claim was for reasons clearly contrary to the provisions

[1127] of the policy, as defined by law or for no legitimate or arguable reason, then it is your sworn duty to assess punitive damages against the Defendant.

INSTRUCTION NO. P-6—GIVEN—Filed December 3, 1981

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

LLOYD M. CRENSHAW	PLAINTIFF
VERSUS	NO. 11,292
BANKERS LIFE AND CASUALTY COMPANY	DEFENDANT

INSTRUCTION NO. P-19A

The Court instructs the Jury that an insurer is obligated to deal in good faith and fairly with its insureds in handling their claims, and to refrain from abuse, gross negligence, malice or fraudulent conduct.

If the handling of an insured's claim is attended by abuse, gross negligence, malice or fraudulent conduct, an independent tort (wrong) may arise, separate from breach of contract, for which punitive damages are recoverable.

Punitive damages are not awarded to compensate the injured party but are allowed in addition to compensatory damages. Punitive damages are granted, therefore, to punish the wrongdoer as an example, to deter the wrongdoer and others from committing similar offenses in the future, and to reward the injured party for his public service in bringing the wrongdoer to account.

They are never awarded to benefit the injured party, but rather to punish and to compel the wrongdoer to have due and proper regard for the rights of the public.

If you find from a preponderance of the evidence if any that punitive damages are warranted, you may take into account the financial status of the defendant, Bankers Life and Casualty Company.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

LLOYD M. CRENSHAW	PLAINTIFF
VERSUS	NO. 11,292
BANKERS LIFE AND CASUALTY COMPANY	DEFENDANT

JURY INSTRUCTION NO. D-1

The Court instructs the Jury that if you believe from a preponderance of the believable evidence in this case that Bankers Life and Casualty Company had a legitimate or an arguable reason for refusing to pay the claim made by Lloyd M. Crenshaw, then you may not return a verdict for him which includes punitive damages.

The Court instructs you that any award of punitive damages to Lloyd M. Crenshaw must be based on a finding, from a preponderance of the believable evidence in this case, that at the time Bankers Life and Casualty Company denied Lloyd M. Crenshaw's claim, it did not have a legitimate or arguable reason for doing so and that, in denying the claim, Bankers Life and Casualty Company was guilty of such gross and wanton misconduct as to amount to an independent wrong against Lloyd M. Crenshaw.

INSTRUCTIONS
GIVEN
Filed 3rd day Dec 1981
JOE W. MARTIN JR., Clerk
By G. Jones, D.C.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

LLOYD M. CRENSHAW — PLAINTIFF
VERSUS — NO. 11,292
BANKERS LIFE AND CASUALTY COMPANY — DEFENDANT

JURY INSTRUCTION NO. D-7

The Court instructs the Jury that if you believe from a preponderance of the believable evidence presented in this case that the basis of the Defendant's denial of Lloyd M. Crenshaw's claim for benefits was based upon a reasonable medical opinion, that Lloyd M. Crenshaw's alleged accident to his foot had no medical correlation to the surgery performed, then you must find that the Defendant had an arguable basis for the denial of benefits and you further cannot hold the Defendant accountable for punitive damage, even though you might ultimately find Lloyd M. Crenshaw to be entitled to the full policy benefits.

INSTRUCTIONS
GIVEN
Filed 3rd day Dec 1981
JOE W. MARTIN JR., Clerk
By G. Jones, D.C.